A FEW OBSERVATIONS ON LAW AND SOVEREIGNTY, BEING A PARTIAL INTRODUCTION TO THE STUDY OF LEGAL HISTORY.

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The word "law" is employed in the natural sciences and in jurisprudence. In its scientific sense, it conveys the idea of regularity. The sun rises in the East and sets in the West,—not sometimes, but always. The law of gravity is not occasionally, but always, true. Naturally, law can be defined as the order of the succession of natural phenomena. When any given set of conditions is followed by a given result the same antecedent will be followed by a similar consequent. Regularity is not only an essential element in our idea of natural law, but it is the only element in the idea. The word does not embody any conception of a command by an intelligent being to an intelligent nature. The regularity of nature's phenomena is a fact, and this regularity is labeled "law."

In jurisprudence, as well as in the natural sciences, the word "law" carries with it the idea of uniformity. Thus, the command of a despot to cut off the head of A. B. is not a law. On the other hand, if, in practically every case where a man dies intestate, the same rule for the division of his property is followed, then we have a law of intestate succession. Again, if, as a rule, every one who promises another to do or not to do a particular thing, does what he promises under given conditions, then we have a law recognizing the sacredness of contracts.

It is usually supposed, however, that while the regularity of the succession of phenomena is the sole feature of law as the word is used in the exact sciences, in the word as used in its juristic sense the command of a political superior to a political inferior is necessary to complete the idea. Without

denying that in some points of view this may be a correct assertion, I want to show that, for the purpose of historical investigation of the law in which the lawyer is learned, the word means only what it does to the scientific man, the regularity of the succession of phenomena. In this view, the only difference in the definition will be the difference in the phenomena with which the lawyer and the scientist deal. Law, in its juristic sense, will be confined to the actions of men in society. If a given condition produces a definite action on the part of men in society, then there exists a law in the legal acceptation of the term. Take an example: A., the father, is dead. B., C. and D. are his sons. Here we have an antecedent condition. Suppose that B., C. and D. will now each have the power to do what they wish with one-third of the property of the father. No other person in the community will have that power. Here we have following the definite condition, the definite action of the persons in the society in regard to each other, *i. e.*, between the brothers themselves and the rest of the community. If we can predict that the condition, a father leaving children, will be always followed by the action, the equal division of the father's property between the children, we have a law. The simplest definition for the word, as employed, in its juristic sense, is that law is a rule of action. In this view, it does not make any difference what the reason is for the acquiescence of the individual members of the community in the rule of equal division of property among children. It may be a rule of action because it has so been ordered by the legislature of the State, and the government will employ force against the individual who refuses to acquiesce; or it may be that no sanction follows the breaking of the rule of action. If, as a matter of fact, it is not broken, then we have a *rule* of action and a law.

As opposed to this view, it may be said that a mere custom, which anyone can break, is not a law. All men may rise at six in the morning, but if there is no obligation to do so, which obligation has a sanction or penalty for disobedience, then we have a rule of action perhaps, but not a law. Thus, in this view, the sense of obligation to follow the rule, as well

as the rule itself, is essential to the idea of law. And again, this sense of obligation, with a penalty for disobedience is, it is said, not the only additional requisite to the idea of law in its juristic sense. The penalty itself must be inflicted by the political authority known as government. Thus, it may be "dishonorable" for a man not to challenge another who has insulted him. The disapprobation of "society," more terrible than the pains of the law, may be the sanction of the rule of action, and yet the "laws of honor" are not *laws;* the penalties are not given by an organization; those who break them, have not disobeyed the commands of a political superior. The idea of a command by a political superior, capable of enforcing obedience, or the penalty for disobedience as well as uniformity, and the sense of obligation to follow the rule, are thus made essential to the idea of municipal law, or law in its juristic sense.

Thus, in the first view, law is simply a rule of action, if the rule is followed no matter from what motive, it is a law. There is only one difference between the term as so employed and as employed in the natural sciences. In the latter, universality and unchangableness, while impossible of absolute proof, are always assumed. With law in its legal sense, however, the liability to change exists, and while uniformity makes "human laws" rules of action, the uniformity in society is never universal. How universal a rule of action must be before it can be said to be a rule of action at all is a question of taste. We can draw the line anywhere we want to, except that absolute universality can never be insisted upon, or we would have no laws at all.

In the second view, two other requisites are necessary: the obligation to perform the law, and the enforcement of the obligation by a political organization which has commanded it to be obeyed.

Now both of these definitions as to the way in which the term law, in its legal sense, should be employed are, from their several points of view, correct. The difference indicates only a difference in the range of phenomena to be examined. One covers all rules of action, customs, as well as commands—

the other only those which are commands from organized government. If we desire to analyze and to study law as it is enforced to-day in the government under which we live, then, of course, all the elements contained in the second point of view are essential. But if we wish to adopt the historical method of studying the development of rules of action which are now enforced by our government, then we must abandon all thought of confining our observations to rules of action which have been commands, or even to those to which an obligation of any kind is attached.

From the historical standpoint, law is a rule of action and nothing more. Government is itself a growth as well as ideas of private property and mutual rights of persons in society. But the origin of rights lies back of the origin of governments. In fact, one of the causes for the growth of government was the felt necessity of enforcing a definite line of conduct irrespective of individual desire. But back of and prior to the enforcement of law on delinquent individuals, back even of the felt obligation on the part of the individual to follow definite lines of conduct, was the fact that definite lines of conduct were, as a rule, followed.

An illustration will tend to make my meaning clear. The possession of property in common by all the living members of the family, which is the origin of our law of the devolution of property on death, existed in "village communities." Yet this rule of law had no recognized government to enforce it. Thus the village community in India recognized, to a certain extent, this common enjoyment of property, and yet one cannot discern any organization or government which would have inflicted a penalty for the disregard of the rule. Again, the sense of obligation to follow it resting on the individual members of the community, if it existed at all, was probably exceedingly indistinct, because there was no idea of the possibility of not following it, and the obligation to obey a rule only comes with the recognized possibility of breaking it, and probably a realized personal advantage in so doing. The customs of primitive communities are more universal rules of action than any statute of modern governments, not because

the primitive rule of action is "obeyed;" but because the possibility of deviating from the rule does not occur to the primitive mind. When the possibility of deviating from the custom occurred, then the sense of obligation not to deviate had an opportunity to develop. With some rules of action, the idea of obligation became strong enough to enforce obedience on others who failed to feel the obligation. Thus all laws in the sense of commands by organized society through its government to individuals, have passed, if they are not of a purely administrative, corrective, or reformatory character, through three distinct stages. First, we find them simply customs; then customs which the individual felt, as a rule, a moral obligation to follow; and lastly, customs which the community, as a whole, felt justified in forcing the individual to conform to, regardless of his own desires or feelings of obligation, Thus, for instance, the morning gift of the Saxons, by which we mean the rule that a wife, on her husband's death, was entitled to one-half of her husband's property, was at first merely a custom for the husband to give the wife something to provide for her in case she outlived him, the reason for this provision was that among the Teutonic peoples the wife did not share as one of the children in the father's property, as at the Roman law. Afterwards, the custom of giving the wife one-half the husband's property as morning gift was so universal, and the felt obligation to make this provision so strong, that the courts enforced as law what the community had come to recognize as a moral duty. In the same way we can go over the development of contracts at the common law. It was not until the end of the last century that contracts in England were enforced as they are to-day. Yet the custom for men, as a rule, to perform their agreements, is not confined to the modern Englishmen. From the custom grew the obligation, from the obligation grew the enforcement of it as law.

Custom, therefore, is the life of law. Viewing the subject from the standpoint of the historian, law is the custom of the community. Of course, as society develops, the customs which will be enforced by the community are separated from those which the individual is left to follow or not as he will.

Something more than immemorial custom must be back of a rule of action before the community will enforce obedience to it. Dimly or vividly perceived, the welfare of the community in the continuance of the custom, some good higher than that of the single individual, stands back of all enforced customs, making valid the feeling of obligation for its performance, which is the justification for its enforcement.

The student of legal history, therefore, cannot permit himself to be confined to the laws which are "commands of government." The further he goes back in the history of any enforced law, the nearer he gets to the "custom" which was its origin, and which gives it to-day the vitality which really keeps it in force. The purpose of his study must be to trace the slow development of customs and ideas, and their effect in the development and change of positive and "enforced law."

In speaking of the "custom" which lies back of positive rules of action, it should be born in mind that it is only those customs which touch the everyday life of the individual that are of any great importance in relation to the development of jurisprudence. It is from these chief customs that the individual abstracts those ideas which lie at the base of his conception of social relations. These fundamental ideas are properly termed the "legal institutions" of the country. A legal institution simply denotes an all prevailing idea of social relations, which idea, growing out of the deep rooted customs of the community, is the foundation for numerous "rules of action." The modern idea of the marriage relation and its sacredness—the idea of freedom and sacredness of contracts—the idea of absolute ownership in severalty of property acquired—are all modern legal institutions or ideas of social relations fundamental to civilization as it exists and from which spring many minor rules of action. Into all the minor details of the law's development it is impossible for any one man to hope to go, but any one who has the inclination can study the development of the fundamental ideas of the family, the state, communal, and individual ownership, and mark their chief results in the domain of law. In view of the importance of such a study from the standpoint of one who professes to care anything about the

development of our civilization, it is a subject of wonder that so little general knowledge exists. This ignorance is perhaps due as much as anything else to the indifference of lawyers themselves to anything connected with the law which is not practical, *i. e.*, productive of immediate revenue.

Since, from the standpoint of historical jurisprudence, law is simply a "rule of action," the student of legal history is engaged primarily in tracing what have been and what are these rules of action, rather than in speculating on the power which enforced law. The "enforcement" is, as we have seen, not a necessary part of his conception of law, because he does not look on law as a command. But to the analytical jurist, *i. e.*, one who analyzes the law which the court to-day enforces, the "command" is the central idea in the conception of law. Thus, Austin, the chief of the analytical jurists, says that a law in its juristic sense is a rule laid down for the guidance of an intelligent being by a sovereign person or sovereign body of persons. In defining what he means by a "sovereign body of persons," he says that it is to be known by the following characteristics: First, "The bulk of a given society are in a habit of obedience or submission to a determinate and common superior, let that common superior be a certain individual person or a certain body or aggregate of individual persons. Second, that certain individual, or certain body of individuals, is not in a habit of obedience to a determinate human superior." Again, he says: "If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and that society (including the superior) is a society political and independent." To every sovereignty is attached an independent political society. From this there are deduced several propositions. There cannot be two bodies sovereign in the same political society. There cannot be such a thing as limited sovereignty. There cannot be a government at once supreme and dependent. Austin has gone into elaborate reasonings to show where the sovereignty is in different governments. His investigation starts with the assumption that if he only looks long enough he will

be able to lay his hand directly on the sovereign in any political society.

What Austin meant by sovereignty and sovereign, the writer fails to understand. The handling of the subject is foreign to the historical method of investigation with which he is familiar. The discussion of Austin, however, does suggest a real problem of no little difficulty, though whether it is the same problem which Austin was trying to solve, is not altogether clear. At any rate, it is one which lies at the threshold of the study of law's development and has to do with sovereignty in the only two senses in which the word is intelligible to the student of legal history.

In examining the facts of social and political life, we all recognize, first, that many laws are obeyed by particular individuals against their desire; and, second, that law develops and changes. Taking up this line of thought, we may ask ourselves two questions: What is it that enforces the law? What is it that changes the law? These are two distinct questions.

In primitive societies, law is not enforced in the modern sense. That is, a man can break the law if he wishes. The rule of conduct is followed because men never wish to break it. Therefore, in primitive societies the first question would have no meaning. But as society advances, the domain of law widens. That is, as it comes to deal with more complicated relations, and men's actions are less influenced by heredity and more by an intelligent appreciation of the pleasure resulting to themselves, there arises the necessity to enforce the law which would otherwise, in many instances, be disregarded. The machinery which enforces the law is known as government. The sovereignty in the community in its first sense is the force which stands back of the government in its enforcement of the law. Now, in a sense, no matter who has the government, whether a single person, or body of persons, whether we call it monarchical, aristocratic or democratic, the real factor which is back of the enforcement of law, is the brute force of the community. The people desire the law as it is, or they do not care to alter it, or know not how to alter it, which is the

same thing. The Czar of Russia is said to be sovereign through his dominions. He is said to command all the laws which he permits to exist. Yet his real strength lies in the fact that the brute force of the community is behind him aiding in the law's execution. Take a regiment under the leadership of a single man. In one sense, the commanding officer is the ruling power; in another sense, the regiment or rather any of the members who, by force of numbers, arms, skill, etc., could by brute force overcome the rest, is the power which would force the individual will if force were necessary. Carlisle has said that discipline in arms is always a miracle. I would add that law and government are also miracles. Why should the people, why should the army of Russia obey the Czar? Why should the people of the United States recognize as laws to be obeyed the acts of Congress or of State Legislatures? These are questions which I do not believe one of the sixty-five millions of us could answer satisfactorily to himself. If, therefore, we regard the question of sovereignty from a statical standpoint, as what enforces the law, we must answer that as far as there is any force, it is the brute force of the community.

We come now to the second question, "What causes changes in the law?" I suppose that most of us would ascribe such changes to legislation. Legislation is indeed the immediate source of many changes. But we must remember that only that is law which men in society actually, as a matter of fact, follow. Men follow a rule of action because they desire to follow it. The brute force in the sense just explained is behind those laws alone which the people, as a whole, desire to follow. They cease following one rule of action and follow another because they desire to change and follow that other. Be the causes of change what they may, the fact that man does change his ideas concerning rules of conduct is undisputed. Now, if A. changes his opinion, from whatever cause, of what it ought to be, C. may, from that very fact, change his opinion also. All of us, some in a greater and some in a less degree, influence others. Our changing opinions as to what ought to be the law, as far as they affect others, tend to change the law. If, therefore, we call sovereignty the power of changing the

law, in so far as each of us can effect our fellows we are each sovereign. Sometimes the changing opinions of one man changes or affects the opinions of many others. The Czar of Russia issues an ukase. It is his personal opinion as to what ought to be. Instantly, millions of Russians recognize that which he has said as the rule of action which, from various motives, partly religious, partly political, but mainly as an inherited tendency, they desire to and do follow. What a Czar does in high degree, a judge does to less extent. For instance, a court of high authority applies the principles of law to a new case. In doing so, the court may alter those principles hitherto received. This may be done consciously or unconsciously. True, the fiction is always kept up that the old principles are not altered. The farthest a court will ever admit that it has gone at the time of the decision, will be to say that it is returning to sound principles, anciently in force before some recent mistakes. And yet, if a new principle really has been established, the truth will in subsequent cases be acknowledged and even pointed out with pride. The Czar and the judge each have a large measure of sovereignty in this sense of the term. But this sovereignty, or the capacity to change the opinions of others and consequently to develop the law, is not confined to those in office. The individual advocates a change in the laws, others follow his opinion, and as a result of his agitation, the change takes place. Thus each of us are in a degree sovereign, but each in a different degree.

In this second sense, as the actual power to change the law sovereignty is never absolute. We have never heard of a person, no matter what influence he might have on the desires of others, who was sovereign in this absolute sense. Take the most absolute monarch that ever sat upon a throne, (and none more absolute than the eastern potentate, whose "word is law" and whose subjects would sacrifice their lives to grant him the slightest wish) even he is not sovereign, perhaps, indeed, far less sovereign, in the sense we are now discussing, than many a private citizen of influence in a western community. For if an eastern potentate ever thought of legislating, which he never does, except to enact a new tax

law; if he ever, for instance, attempted to change the law of the devolution of property on death, perhaps taking from the heir, the ability (prized by all religious Hindoos), to perform the sacra, he would find that his law, for the first time, would not be obeyed, and his power would be undermined. In a certain class of laws, those dealing with the army and the revenue, the sovereignty is unquestioned, but on other subjects there is practically no sovereignty at all.

Take again the Congress of the United States. Are its members sovereign? In a sense, yes; in another, no. Let them all be convinced, or a majority of them, that interstate freight should be regulated along certain lines, then regular action will on this subject make a new law. It is absurd to say that in this instance they hold but a delegated sovereignty. The people who elected them may have never thought of interstate commerce or its regulation. On certain subjects these men are sovereign, but only on certain subjects. Let them pass a statute giving the property of the country to men over six feet. This could never be a law in the sense in which we use that term as a recognized legal relation. It is true it would be unconstitutional, but though the written constitution were to be formally abolished to-morrow, and the Congress in formal terms said to be unlimited in power, the limitation to its sovereignty by the facts, would still remain unaltered. It could no more make an act, such as we have mentioned, recognized as law, than could the British Parliament, which is theoretically omnipotent. A limited sovereignty is often said to be a contradiction in terms. It would seem, however, from our analysis, that if we mean by sovereignty, the actual, not theoretic power, to change the laws, *sovereignty is always limited.* And not only is sovereignty in this sense always limited, but if we add together the sovereignty of a great number of persons, the sum will never be any absolute sovereignty in the sense that any change which they may advocate will be followed by the brute force of a community and given the force of law. The changing opinions of influential men would not alone suffice to change the laws in every particular. Man's influence over his fellow men is never so

absolute. Law has its basis ultimately in the conditions physical, economic and social which exist. The influence of a change in opinion without a change in conditions must be limited.

Before leaving the subject it may be well to point out that the term sovereignty is sometimes used in a purely legal sense, as the theoretical power to make absolute changes in the law. Thus, in this sense, Parliament is absolute. Any rule of action made by it would be technically law from the lawyer's standpoint; though, as we have seen, not *actually* law, because the direction of Parliament would, as a matter of fact, only be followed within certain limits. In this sense, conventions in three-fourths of the United States are with us sovereign, because their united action could produce a change in our constitution. As used in this last sense, the term "sovereignty" is of no importance to the student of law's development. His business is to deal with actualities—not with theoretic possibilities.